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Dec 22, 2006

No. 06-730

In The
Supreme Court of the United States

STATE OF WASHINGTON; ROB MCKENNA, Attorney General; SAM REED, Secretary of State,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONSE OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE TO PETITION FOR A WRIT OF CERTIORARI

DAVID T. MCDONALD
Counsel of Record
JAY CARLSON
ALEX WAGNER
PRESTON GATES & ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
(206) 623-7580
Attorneys for Respondent Washington State Democratic Central Committee

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In 2004, Washington State adopted a compulsory primary election system for partisan office that requires the Democratic Party to accept as Democratic candidates all registered voters who desire to have the Democratic Party's name printed after theirs on the ballot. No mechanism is provided by law nor is any party-run selection process recognized that would permit the Democratic Party to select or limit the candidates with whom it is associated on these public ballots and in publicly-financed election material. Moreover, under this system all primary voters, whether affiliated with the Democratic Party or not, select the candidates who will appear on the general election ballot with the Democratic Party's name after theirs, if any.

Should Washington's partisan primary system be subject to strict scrutiny in light of *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Clingman v. Beaver*, 544 U.S. 581 (2005)?

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STATEMENT OF THE CASE

Since its first elections as a state in 1889, Washington has conducted partisan elections. As part of its partisan election system, candidates for partisan office have always had their party affiliation printed after their names on primary and general election ballots. Throughout Washington's history as a state, partisan political candidates have been explicitly associated with partisan political parties on election ballots.

Between 1935 and 2004, Washington State forced political parties to allow the general public to select the party's general election candidates by means of a blanket primary. In 2004, Washington's blanket primary was finally determined to be unconstitutional in light of this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Democratic Party of Washington State v. Reed,* 343 F.3d 1198 (9th Cir. 2003), *cert. denied,* 540 U.S. 1213 (2004), and *cert. denied,* 541 U.S. 957 (2004).

In response to the constitutional infirmities of the blanket primary, the Washington Legislature adopted an "open private choice" primary system. In this system, a voter can only vote in one party's primary in any given election. The choice of party primary in which to vote is deemed to imply an affiliation of the voter with that party, but the voter's choice of party is private.

Immediately thereafter, the Washington State Grange sponsored Initiative 872 "to protect the state's primary system" and to "preserve[] the rights that voters now enjoy under the [unconstitutional] blanket primary." Ct. App. ER 512 (internal quotation marks omitted). In a "Frequently Asked Questions" statement explaining its initiative, the Grange told voters that, if the initiative

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were passed, the primary ballot would be just like the primary ballot used in the unconstitutional blanket primary:

> At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary).

Ct. App. ER 22. Grange President Terry Hunt stated: "Our initiative will put a system in place which looks almost identical to the blanket primary system we've been using for nearly 70 years." Ct. App. ER 501.

Initiative 872 defined partisan office as any office for which any candidate may have his or her party preference appear on the primary and general election ballot "in conjunction with" the candidate's name. State App. 119a (I-872 § 4). Under the Initiative, at the time of filing for partisan office, any registered voter may indicate that his or her party preference is Democrat. The state will then place that party identification after the name of the candidate on primary and general election ballots and will repeat that party identification to the voting public in a government-produced voters' pamphlet. State App. 117a-118a, 120a (I-872, §§ 7-8, 11). Moreover, as with the blanket primary found unconstitutional in *Jones*, all voters are permitted to vote for any candidate for each partisan office without any limitation based on party preference or affiliation. State App. 115a (I-872 § 3). In order to appear on the general election ballot, a candidate must be one of the two candidates receiving the most primary votes. State App. 117a (I-872 § 7). The names of successful primary candidates appear on the general

election ballot "in conjunction with" the party preference each candidate indicated at filing. State App. 115a-116a (I-872, §§ 4, 6).

The Democratic Party has rules requiring that its candidates for public office be selected by Democrats, either in a public primary or a party-run caucus. However, the State of Washington refuses to recognize any process for nominating partisan candidates other than that provided by I-872. Ct. App. ER 45-53. Indeed, under Initiative 872 members of the Democratic Party are deprived of any opportunity to determine the candidates or voters with whom they will be associated in the primary and general balloting for partisan races.

I-872 was intended to affect the Democratic Party's choice of candidates and adulterate the Democratic Party's political message: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters." Ct. App. ER 257. "[Candidates] will not be able to win the primary by appealing only to party activists." Ct. App. ER 29.

Initiative 872 was passed by the voters in November, 2004. Shortly thereafter, the Republican Party of Washington filed suit seeking an order declaring Initiative 872 unconstitutional. The Democratic Party intervened as an additional plaintiff.

1. Proceedings in the District Court.

The political parties sought summary judgment and entry of a permanent injunction against implementation of Initiative 872 on the basis that the Initiative severely burdened their First Amendment rights of association and

was not narrowly tailored to advance a compelling state interest. The United States District Court for the Western District of Washington (Zilly, J.) issued its opinion July 15, 2005. The district court noted the State's Voters' Pamphlet had summarized for voters the effect of passing the Initiative as follows:

> This measure would allow voters to select among candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving [the] most votes advance to the general election regardless of party.

State App. 60a. The district court summarized the constitutionally relevant aspects of the primary election system created by Initiative 872:

> (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

State App. 72a (footnote omitted).

The district court found that "a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." State App. 65a (internal citations and quotations omitted). The district court concluded that "Initiative 872 . . . impermissibly denies party adherents the opportunity to nominate

their party's candidate free of the risk of being swamped by voters whose preference is for the other party." State App. 75a (internal citation and quotations omitted). It "forces political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." State App. 75a. The district court concluded that Initiative 872 imposed a severe burden on First Amendment rights, that it was not narrowly tailored, and that no compelling state interest that it advanced had been articulated. Accordingly, the district court found Initiative 872 to be unconstitutional. State App. 91a.

2. United States Court of Appeals for the Ninth Circuit Proceedings.

The State and the Grange appealed the district court's decision. The Ninth Circuit found that:

> By including candidates' self-identified party preferences on the primary ballot, Washington permits all voters to select individuals who may effectively become the parties' standard bearers in the general election. . . . Whether or not the party wants to be associated with that candidate, the party designation is a powerful, partisan message that voters may rely upon in casting a vote [] in the primary and in the general election. The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in California's partisan [blanket] primary system.

State App. 19a-20a. In its opinion the Ninth Circuit concluded that:

> The net effect [of Initiative 872] is that parties do not choose who associates with them and runs using their name; that choice is left to the candidates and forced upon the parties by the listing of a candidate's name "in conjunction with" that of the party on the primary ballot. Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights.

State App. 25a (internal citations omitted).

The Ninth Circuit found that neither the State nor its co-party the Grange had articulated any compelling state interest to justify the burden placed upon associational rights. It affirmed the district court's conclusion that Initiative 872 was unconstitutional.

REASONS FOR DENYING THE PETITION

1. The Ninth Circuit Did Not Err.

The State concedes that the Ninth Circuit recognized and applied the proper test for constitutionality of statutes that burden First Amendment rights, as mandated by this Court under *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). State Pet. at 16. As the State concedes, under that test, where a statute severely burdens associational rights it must be narrowly tailored to advance a compelling state interest before it may be held constitutional. State Pet. at 16. The State has not articulated, either in its Petition or in the proceedings below, any compelling state interest that Initiative 872 is narrowly tailored to advance. State App. 4a. Instead, the State simply disagrees with the conclusion of the Ninth

Circuit and the district court that Initiative 872 severely burdens First Amendment rights. The State is wrong.

The proponents of Initiative 872 made clear in their campaign that the purpose of the Initiative is to force political parties to recruit different candidates and articulate a different message that appeals to a "broad" group of voters, not party members. In *Jones*, this Court concluded that such an outcome, which effectively changes a political party's message, is a severe burden on First Amendment rights. Indeed, this Court noted, "We can think of no heavier burden on a political party's associational freedom." *Jones,* 530 U.S. at 582.

The State does not dispute that Initiative 872 forces political parties to be associated with self-identified candidates on public ballots. Instead, it seeks to exempt Initiative 872 from strict scrutiny by arguing that under Initiative 872, primary voters are not "nominating" candidates with whom the Democratic Party will be associated on the general election ballot, only deciding which self-designated Democrats, if any, will be permitted to advance. But this is a distinction without a difference. As with the blanket primary invalidated in *Jones*, candidates for partisan elective office are associated on primary and general election ballots with political parties that they self-select without party involvement. And all voters, regardless of party affiliation, are still determining which party-identified candidates, if any, will advance from the primary to the general election ballot.

The State's argument might be persuasive if the primary compelled by Initiative 872 were preceded by a party nomination process that allowed the party to select those candidates with whom it would be associated on the

ballot. In such circumstances, voters at large would not be selecting the party's candidates and the constitutional burden might be acceptable. *See Jones*, 530 U.S. at 585-86; *see also id.* at 598 n. 8 (Stevens, J., dissenting) (non-partisan blanket primary described by Court is a system "in which candidates previously nominated by the various political parties and independent candidates compete.").[1]

The primary created by Initiative 872, however, is not the primary contemplated in the *Jones* dicta. Party labels are used; therefore the primary is not "non-partisan." Indeed, the State concedes that party labels used on a ballot communicate information that voters may find relevant to their voting decisions. State Pet. at 11-12. As the Ninth Circuit noted, "political parties' names matter; they are shorthand identifiers that voters traditionally rely upon to signal a candidate's substantive and ideological positions." State App. 27a (citation omitted). This Court in *Clingman v. Beaver* expressed concern that "[o]pening the [Libertarian Party's] primary to all voters . . . would render the [Libertarian Party's] *imprimatur* an unreliable index of its candidate's actual philosophy." 544 U.S. 581, 595

[1] The State argues the cited section of *Jones* creates a constitutional framework in which the Democratic Party's First Amendment rights have strong protection against non-adherents selecting one candidate for the Party but virtually no protection against non-adherents selecting two candidates for the Party. The Party's right to select the individuals who will carry its message to the public is an area of special protection under the First Amendment. It is not an area in which this Court would elevate form over substance as argued by the State. "[O]ur cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Jones*, 530 U.S. at 574 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

(2005) (emphasis in original). Initiative 872 undermines the ability of a political party to control its message to the voters even more profoundly than did the statute addressed in *Clingman*. Under Initiative 872, State election officials do not recognize any party-based candidate selection process, do not provide any public process for Democrats to select their candidates other than the primary created by Initiative 872, and freely allow any candidate to use the Party's name on the election ballot.

The State has no right to force the Democratic Party to include anyone in its general election "parade" of messengers. This Court has long recognized that a political party has a constitutional right to nominate its standard bearers. *Timmons*, 520 U.S. at 359. The State gains no additional rights to modulate a political party's message by virtue of forcing two candidates onto the party rather than only one.

Having determined that the Initiative imposes a severe burden on the associational rights of political parties, the Ninth Circuit found that neither the State nor the Grange had articulated a compelling state interest that Initiative 872 advances. To the extent that the State and Grange sought to rely on the alleged compelling state interests articulated in support of the blanket primary and rejected in *Jones*, the Ninth Circuit determined that Initiative 872 was not narrowly tailored: the State could have advanced its interests by requiring that candidates entitled to use the Democratic Party's name on ballots be selected by the Party in advance, and requiring those not selected to run as independents.

The Ninth Circuit correctly analyzed Initiative 872 as required by this Court in *Timmons* and found it wanting. It correctly declared Initiative 872 unconstitutional.

2. Neither this Court nor the Ninth Circuit Have Left Any Uncertainty for States as to their Constitutional Choices in Structuring Election Laws.

The State asserts that the Ninth Circuit's opinion in this case – which strictly adheres to constitutional guidelines articulated by this Court over decades – "leaves states uncertain as to their constitutional choices in structuring their election laws." State Pet. at 18. On the contrary, the constitutional limit to a state's power to organize its partisan elections is crisp and clear: the state must allow each political party to select its candidates. Provided it does so, the state may provide any election system that sets reasonable, non-discriminatory qualifications – including a public voting mechanism – to determine which of those candidates appears on the general election ballot. Review by this Court of the Ninth Circuit's decision in this case is not necessary to clarify this simple, straightforward rule.

CONCLUSION

The Ninth Circuit was correct in affirming the district court's conclusion that Initiative 872 unconstitutionally invaded core First Amendment rights of association. The State of Washington's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID T. MCDONALD
Counsel of Record
JAY CARLSON
ALEX WAGNER
PRESTON GATES & ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
(206) 623-7580
Counsel of Record for Respondent Washington State Democratic Central Committee

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